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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of: Goodman et al.	Group Art Unit: 1647
Serial No. 08/971,172	Examiner: Turner, S.
Filed: November 14, 1997	Attorney Docket No. B98-006-2
For: *Robo: A Novel Family of Polypeptides and Nucleic Acids*	

CERTIFICATE OF TRANSMISSION
I hereby certify that this corr is being transmitted by facsimile to the Comm for Patents at 703-308-6916 on March 6, 2003.

Signature _____
Richard Aron Osman

PETITION TO RESCIND DIRECTOR'S DECISION AND EXAMINER'S ANSWER

The Commissioner for Patents
Washington, DC 20231

Dear Commissioner:

We petition the Commissioner to review and rescind the TC1600 Director's Decision dated 1/22/03, to rescind the Examiner's Answer dated 10/1/02, and to reprimand Examiners Kunz and Turner for their abuse of procedure in this application.

The Director's Decision is factually and legally incorrect and is not supported by substantial evidence. As our initial petition explained, the Examiner seeks to introduce in her Answer, for the first time, new evidence to support her rejections. In particular, the Examiner relies on a newly introduced email string to support her allegation of a 2-14-97 publication date; though, ironically, this new evidence in fact further undermines her position by alleging yet another creation date of 2-7-97. However, neither we nor the Board are able to consider the Examiner's newly proffered evidence in the form of an Answer. If the Examiner wishes to rely on new evidence to support her rejection, she may not introduce it for the first time in her Answer. Applicants have had no opportunity to confront or rebut this new evidence, and the Board may not consider unvetted evidence.

The Director's Decision is triply flawed. First, the Decision Orwelleanly argues that the newly presented and relied upon new evidence is not "new evidence", but is merely source

material to confirm further facts already presented. Regardless of what the Examiner hopes to gain from her presentation of new evidence and regardless of its form or whether it supports or contradicts facts already alleged or yet to be alleged or never to be alleged, it is still new evidence. Call it "new material which we believe supports our position", call it anything you want, it is still new evidence, and new evidence may not be presented in an Answer.

Second, the new evidence is inconsistent with the Examiner's prior allegation, creating an unreviewable record. This Examiner has repeatedly alleged, without evidence and contrary to logic (see, our pending Appeal Brief explaining why the cited document which references dates and events in March 2000, could not logically have been created in Feb 1997) a 2-14-97 publication date. However, the new evidence proposes a 2-7-97 publication date. For the reasons explained in our Brief, this newly proposed date can not possibly be the publication date. But on which impossible publication date does the Examiner seek to rely? Having thrice re-read the last paragraph of p.2 of the Decision, we still have no idea which of the two equally impossible and mutually exclusive dates is now being relied upon.

Which brings us to the Decision's third flaw: it relies on reckless partisanship to the point of repeatedly misstating the record to its favor. For example, on p.2, lines 14-15, the Decision states that 2/7/97 "is the date shown on the printout of U88183 previously provided applicants". This is untrue. The date on that printout is 2/14/97. Again, on p.2, lines 31-32, the Decision states that the Answer "again asserted the creation and public availability date of U88183 as 2-7-97". This is doubly untrue. First, there was no first time, so the rhetorically dramatic "again" is false. Second, there was no second time either: in her Answer, the Examiner never asserts a 2-7-97 creation or publication date. She only alleges her 2-14-97 date, yet her new evidence (the newly included email string) inconsistently references 2-7-97; an inconsistency which she dances around by generically stating that her new evidence "is consistent with a public availability date prior to April 1997", hoping everyone will graciously ignore the fact that it is inconsistent with all her prior representations of a 2-14-97 publication date.

Almost finally, note the second and third-to-last sentences of the Decision. In the first of the two sentences, the Examiner's alleged publication date(s) are "disputed by applicants". However, in the second sentence, this date (which one, we ask?) is a "clearly well-known fact". Excuse us, but we are not disputing any "clearly well-known fact", but rather several mutually inconsistent, mutually impossible allegations.

And finally, to ensure a correct record, we note that the Director's Decision repeatedly

refers to a non-final Office Action mailed July 9, 2001 (Decision, p.2., lines 9 and lines 17-18). There is no such Office Action. It appear that the Decision is confusing a prior Petition Decision with the non-final Office Action mailed 3/27/01.

The Commissioner is requested to rescind the Answer and respond to our pending Appeal Brief in a manner consistent with applicable rules and governing laws.

The Commissioner is hereby authorized to charge any fees or credit any overcharges relating to this communication to my Deposit Account No. 19-0750 (order B98-006-2).

Respectfully submitted,
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cc. Esther Kepplinger (by email)